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92-222

No. _____

Supreme Court, U.S.
FILED
AUG 6 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

STATE OF TENNESSEE,

Petitioner,

vs.

MELVIN CRUMP,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of Tennessee

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL APPENDIX A

MINUTES, MAY TERM, 1ST DAY OF JUNE, 1989

MINUTE BOOK 31, PAGE 755

STATE OF TENNESSEE, PLAINTIFF, VS. MELVIN CRUMP, DEFENDANT.	MOTION TO SUPPRESS STATEMENTS 88-F-2144 88-F-2146 ORDER GRANTING MOTION TO SUPPRESS STATEMENTS. STATE GRANTED LEAVE TO FILE INTERLOCUTORY APPL.

ORDER ON MOTION TO SUPPRESS STATEMENTS

For the reasons stated in the Court's Memorandum Opinion dated May 25, 1989, defendant's Motion to Suppress Statements is hereby GRANTED, and the evidence of oral and tape recorded statements is hereby excluded from evidence pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966) and progeny. For the reasons further stated in the said Memorandum, the State is granted leave to file an interlocutory appeal for the reasons expressed in Rule

9(a)(1) and (3) and according to the terms described in said Memorandum.

This the 1 day of June, 1989.

/s/ Walter C. Kurtz
WALTER C. KURTZ
JUDGE

APPROVED FOR ENTRY:

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Ordered that Court stand adjourned until morning at nine o'clock.

/s/ WALTER C. KURTZ JUDGE

SUPPLEMENTAL APPENDIX B

IN THE FIFTH CIRCUIT COURT
FOR DAVIDSON COUNTY, TENNESSEE

STATE OF TENNESSEE	)	NO. 88-F-2146
VS.	)	88-F-2144
MELVIN CRUMP	)	
	)	(Filed May 25, 1989)

MEMORANDUM

This defendant is charged in case 88-F-2146 with one count of first degree murder and one count of armed robbery. In a second indictment, 88-F-2144, he is charged with escape from the Department of Correction.

The defendant has filed a motion to suppress certain oral and tape recorded statements made by the defendant subsequent to his arrest on these charges. The defendant alleges a violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). He further alleges a violation of the due process provisions of both the state and federal constitutions in that he contends the statements were taken from him as a result of threats and physical assaults by law enforcement officers. *See Brown v. Mississippi*, 297 U.S. 278, 56 S.Ct. 461 (1936).

The Court heard evidence on these motions on May 3, 1989, and again on May 5, 1989, and the matter was taken under advisement. Defense counsel have filed extensive briefs in support of their positions. The State declined to file a brief in support of its position, but cited the court to several cases.

The Court heard proof from a number of police officers, several civilian witnesses, and heard the testimony of the defendant.

The Court will attempt to set forth its findings of fact as succinctly as possible. The defendant was arrested on September 27, 1988, at a private residence here in Davidson County some time between noon and 1:00 P.M. Participating in the arrest were a number of detectives; Sergeant Robert Moore, Detective Grady Elam, Detective Mike Smith, Detective Ed Moran, Detective Terry McElroy, and several uniformed patrol officers. Upon being arrested, the defendant was placed in a police automobile and Detective Grady Elam proceeded to inform the defendant of his *Miranda* rights. Using a *Miranda* card (Exhibit 4), which he carried with him, he stated as follows:

1. You have the right to remain silent.

2. Anything you say can and will be used against you in a court of law.

3. You have the right to talk to a lawyer and have him present with you while you are being questioned.

4. If you cannot afford a lawyer, one will be appointed to represent you before any questioning if you wish one.

5. You have the right to stop answering questions at any time.

Detective Elam then turned the card over and read the waiver questions from the back of the card. He first asked the defendant if he understood his rights. The defendant responded in the affirmative. The defendant

was then asked if he wanted a lawyer. The defendant responded in the negative. Then Detective Elam said, "having these rights in mind, do you wish to talk to us now?" The following testimony from Detective Elam describes the answer.

> And I don't remember exactly what he said, it was either I don't have anything to say right now, or I don't have anything to say. I'm not exactly sure what the wording was, but he didn't have anything to say to me.

Having received this answer, Detective Elam asked no further questions, but did tell the defendant that they were investigating a murder. The defendant responded that he didn't have anything to do with any murder. Detective Elam made no further comments.

Another officer returned from the apartment where the defendant was arrested and asked Detective Elam if the defendant had been given his *Miranda* rights. Elam responded that he had, but did not tell this other officer, Sergeant Robert Moore, that the defendant did not want to make a statement. Moore and Elam got in the car with the defendant and drove him to police headquarters. Upon reaching police headquarters, Moore decided that he would question the defendant; and that instead of booking the defendant and taking him before a magistrate, he would drive the defendant to several locations related to the investigation of the murder. Moore asked the defendant if he would accompany him in his automobile and the defendant said yes. Although the defendant had been brought to police headquarters, he was not removed from the police automobile. Moore and two

other detectives got in the automobile with the defendant, left police headquarters, and went to several locations related to the investigation of the murder. Sergeant Moore took the defendant for a ride in order to elicit incriminating statements from the defendant. This is interrogation. *See Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682, 1689-90 (1980).

Detective Mike Smith, who was also in the automobile, did most of the talking because he had good "rapport" with the defendant. Smith had also been one of the arresting officers. During this ride, the defendant was asked questions regarding certain events related to his escape and the murder. The defendant responded with answers that were inculpatory.

It was during this ride that the defendant claims that he was taken to a remote location in Davidson County and beaten by all three officers. The Court finds no validity to the defendant's claim that he was threatened and beaten. His testimony is not credible, and the Court credits the testimony of the officers that the defendant was not threatened and beaten.

The ride in the police car lasted about forty-five minutes. The defendant was then returned to police headquarters for further questioning. He was taken to an office, and with Detective Elam and Detective Smith, was for the second time given his *Miranda* warnings. At approximately 2:45 P.M., the defendant was read his *Miranda* rights by Detective Smith and signed a written waiver (Exhibit 1). The written waiver was read to the defendant before he signed it. The defendant was asked "what level of education do you have," and he responded

"none." Even though the defendant testified at the evidentiary hearing, the State never pursued the question of his education, and the Court concludes that the defendant is a person of very limited education.

During the reading of the waiver, the defendant attempted to make a comment. The defense insists that this was an attempt by the defendant to invoke his right to an attorney, and that the defendant stated "I want one now." The State, on the other hand, contends that the defendant said "I don't want none." The Court has listened several times to the tape of this conversation (Exhibit 3), and concludes that it cannot be determined from the tape what was said by the defendant. However, this Court credits the testimony of Detective Elam that the defendant responded by saying "I don't want none." This is further corroborated by the defendant's subsequent actions. The court finds that the defendant did not request counsel.

The defendant made a statement which was tape recorded and transcribed (Transcript-Exhibit 2). The defendant was then taken before a magistrate some time between 3:30 P.M. and 4:00 P.M.

The Supreme Court held in *Miranda* that the police must follow certain guidelines when conducting custodial interrogations in order to protect the constitutional rights of the suspect. Under *Miranda* the police must not only give the suspect a familiar set of warnings, but they also must "scrupulous [sic] honor" the suspect's right to cut off questioning. As the *Miranda* court emphasized "if the individual indicates in any manner at any time prior to or

during questioning that he wishes to remain silent, the interrogation must cease." *Miranda supra* at 1627.

In this case, the defendant did invoke his right to remain silent. A prior Tennessee case holds that almost identical language invokes the right to remain silent. *See O'Brien v. State*, 221 Tenn. 346, 426 S.W.2d 507, 508 (1968) ("I have nothing to say at this time"). *See also Christopher v. Florida*, 824 F.2d 836, 841-42 (11th Cir. 1987) *cert. denied* 108 S.Ct. 1057 ("I got nothing else to say" is unequivocal); *State v. Klimczak*, 268 A.2d 372 (Conn. 1970) ("don't bother me" indicates assertion of right to remain silent); *People v. Carey*, 227 Cal.Rptr. 813, 814-15, 183 Cal. App. 3d, 99 (2d Dist. 1986) (suspect's statement "I ain't got nothing to say" was an invocation of right to remain silent).

In *Michigan v. Mosely*, 423 U.S. 96, 96 S.Ct. 321 (1975), the Supreme Court explored in greater detail the scope of the suspect's right to cut off questioning:

> A reasonable and faithful interpretation of the *Miranda* opinion must rest on the intention of the Court in that case to adopt "fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored. . . . " 384 U.S., at 479, 86 S.Ct., at 1630. The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." *Id.*, at 474, 86 S.Ct., at 1627. Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of

> the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his "right to cut off questioning" was "scrupulously honored."

Id. at 326.

In *Mosely* the Supreme Court decided that while there was no absolute bar against subsequent questioning of the suspect who had invoked the right to remain silent, the admissibility of any statement solicited by subsequent questioning depends upon whether the invocation of the right to remain silent was "scrupulously honored." *Id.* at 326. The facts in *Mosely* supported the conclusion that defendant's right had been scrupulously honored: the police ceased the initial interrogation, resumed questioning only after a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been the subject of the earlier interrogation, i.e., one that Mosely had not previously declined to discuss. *Id.* at 327-28.

Applying the principles of *Miranda* and *Mosely* to the facts of the instant case, the Court must conclude that Crump's right to cut off questioning was not "scrupulously honored" during his interrogation on September 27, 1988. The defendant having invoked his right to remain silent, was transported to police headquarters; yet, within twenty minutes, he was taken away in a police car with three other officers and questioned during a forty-five minute automobile ride. Then returning to police headquarters he was given *Miranda* warnings and,

subsequently, made a taped statement. The taped statement merely followed the subject matter of the statements previously made by the defendant during his automobile ride. This is not the "scrupulously honored" provision envisioned by the Supreme Court in *Miranda* and *Mosely*.

The State can make several arguments in an effort to provide for the admissibility of the taped statement taken at police headquarters. The State might argue that although the defendant did invoke his right to remain silent, he subsequently made "voluntary" statements in response to police interrogation. This argument is appropriately refuted by the following passage from a decision of the United States Court of Appeals for the Eleventh Circuit:

> The state . . . argues that we should affirm the district court's determination that Christopher did not adequately assert his right because he "voluntarily" continued the interrogation. 582 F.Supp. at 644.
>
> The state cannot prevail in this argument, however. Contrary to the district court's holding, a suspect's claim that the police violated his right to silence by failing to immediately terminate the interrogation, is not negated by the fact that the suspect answered additional questions after the police failed to scrupulously honor his request to end questioning. *See Martin*, 770 F.2d at 923-24; *Hernandez* 574 F.2d at 1369. "[A]n accused's post-request response to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself." *Smith v. Illinois*, 469 U.S. 91, 98, 105 S.Ct. 490,

> 495, 83 L.Ed.2d 488 (1984). The fact that Christopher continued to speak, therefore, has no bearing on his claim that he invoked, and the police failed to honor, his right to remain silent.

Christopher v. Florida, 824 F.2d 836, 841 (11th Cir. 1987), cert. denied 108 S.Ct. 1057.

The State may further argue that the giving of a second set of *Miranda* warnings, and the defendant's waiver of his rights, would allow for the admissibility of the second statement given at police headquarters. In a lengthy decision involving facts remarkably similar to the facts in this case, the Supreme Court of New Jersey in the case of *State v. Hartley*, 511 A.2d 80 (N.J., 1986) thoughtfully analyzed all the authorities and principles governing this issue. The New Jersey Court concluded that the police having failed to have "scrupulously honored" the defendant's right to remain silent, a second confession must be suppressed; even though *Miranda* warnings were given. In reaching this Court's conclusion in this case, it relies heavily on the reasoning of and the authorities cited in the *Hartley* case.[1]

Defendant Hartley was arrested for murder and was given *Miranda* warnings in response to which he asserted his right to remain silent. Subsequently, he was questioned by F.B.I. agents but not given *Miranda* warnings. In response to questioning by the F.B.I. agents, the defendant made certain inculpatory statements. Almost immediately after making the statements to the F.B.I. agents,

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[1] Of special interest is the analysis of the inapplicability of *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285 (1985). *Hartley, supra*, at 91-93.

the defendant was questioned by state authorities who did give him *Miranda* warnings. The defendant repeated the statement which he had given to the F.B.I. agents. The Court concluded as follows:

> . . . we determine that a police failure scrupulously to honor an accused's earlier invoked right to silence amounts to a violation not simply of *Miranda's* prophylactic rules but of the accused's privilege against self-incrimination. Therefore, any statement that a suspect may make after his right to silence has not been scrupulously honored is unconstitutionally compelled as a matter of law. That circumstance in turn requires a close examination of the relationship between the first statement and any subsequent statement.
>
> We conclude that in this case the federal authorities' failure scrupulously to honor defendant's announced intention not to make a statement requires the exclusion, on the State's case, not only of the defendant's confession to agents of the Federal Bureau of Investigation (FBI) but also of defendant's second statement, made to state and municipal authorities. This result is compelled either (1) because the second statement was obtained through a process that was in fact part of the same illicit procedure that produced the first statement, or (2) because it was the product of an unconstitutional interrogation – and this despite the readministering of *Miranda* warnings to defendant before the second statement. Finally, we base the above determinations not only on our understanding of the United States Supreme Court precedents in this area but on independent state grounds of decision as well.

Id. at 82.

The critical factor in this case is that the police did not "scrupulously honor" the defendant's invocation of his right to remain silent. If the police had "scrupulously honored" the defendant's right to remain silent, then after the passage of the significant period of time, they could have interrogated him after a renewed *Miranda* warning and waiver. *See, e.g., Jackson v. Dugger,* 837 F.2d 1469 (11th Cir. 1988); *See generally* Lafave & Israel, *Criminal Procedure,* § 6.9 (g) (1984). In this case, however, the police did not "scrupulously honor" the defendant's right to remain silent, but continued to question the defendant. Therefore, the statements taken must be suppressed.

Does it make any difference that Sergeant Moore, who questioned the defendant during the automobile ride may not have known that the defendant invoked his right to remain silent? The Court believes that it makes no difference. The Supreme Court has dealt with this issue in the analogous situation where a defendant invokes his right to an attorney after receiving *Miranda* warnings. In *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880 (1981), the Court held that a suspect who has expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel had been made available to him, unless the accused himself initiates further communication, exchanges, or conversation with the police. In a subsequent case, *Arizona v. Roberson,* 486 U.S. ___, 108 S.Ct. 2093 (1988), the State attempted to distinguish *Edwards* by arguing that a second officer who interrogated *Roberson* did not know that *Roberson* had invoked his right to counsel. The Court responded as follows:

> Finally, we attach no significance to the fact that the officer who conducted the second interrogation did not know that respondent had made a request for counsel. In addition to the fact that *Edwards* focused on the state of mind of the suspect and not of the police, custodial interrogation must be conducted pursuant to established procedures and those procedures in turn must enable an officer who proposes to initiate an interrogation to determine whether the suspect has previously requested counsel. In this case respondent's request had been properly memorialized in a written report but the officer who conducted the interrogation simply failed to examine that report. Whether a contemplated reinterrogation concerns the same or a different offense, or whether the same or different law enforcement authorities are involved in the second interrogation, the same need to determine whether the suspect has requested counsel exist. The police department's failure to honor that request cannot be justified by the lack of diligence of a particular officer. *Cf., Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972).

Id. at 2101. No less can be said for this situation. Even though Detective Elam may not have told Sergeant Moore that the defendant had invoked his right to remain silent, the State cannot rely on that fact to circumvent the holding of *Miranda.*

This Court concludes as follows:

1. The defendant invoked his right to remain silent and for reasons expressed above, as well as in the case of *State v. Hartley, supra,* both the oral statement in the

automobile and the taped statement at police headquarters must be suppressed.

2. The defendant did not request an attorney.

3. The defendant was not threatened or beaten and, therefore his statements were not taken in violation of due process principles of the federal or state constitutions.

Mr. Carey will please draw the appropriate order granting the motion to suppress for the reasons expressed in this memorandum.

Suppression of this evidence will substantially impair the State from prosecuting this case, therefore, pursuant to Rule 9 TRAP, the State is granted an interlocutory appeal for the reasons expressed in Rule 9(a)(1) and (3). If the State's attorney desires to appeal, he should submit

an order for signature within ten (10) days of this Court signing the order submitted by Mr. Carey.

This the 25 day of May, 1989.

/s/ Walter C. Kurtz
WALTER C. KURTZ
JUDGE

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SUPPLEMENTAL APPENDIX C

IN THE FIFTH CIRCUIT COURT OF DAVIDSON COUNTY, TENNESSEE MINUTES, MAY TERM, 12TH DAY OF JULY, 1989
MINUTE BOOK 32, PAGE 368

WEDNESDAY, JULY 12, 1989

Court met pursuant to adjournment, present and presiding the Honorable Walter C. Kurtz, Judge of the Fifth Circuit Court of Davidson County, Tennessee, when the following proceedings were had, to-wit:

STATE OF TENNESSEE VS. MELVIN CRUMP	MOTION TO SUPPRESS STATEMENTS 88-F-2144 88-F-2146 ORDER RE: MOTION TO RECONSIDER FACTUAL FINDINGS.

ORDER

This cause came on to be heard before the Honorable Walter C. Kurtz, Judge, upon the motion to reconsider factual findings as set forth in its Memorandum Opinion of May 25, 1989. After due consideration and stipulation by counsel for the defendant, the Court is of the opinion that "nine" years of education shall be substituted in the record as the defendant's educational level rather than "none".

It is therefore ORDERED that "nine" shall be substituted in the record for "none" as it refers to the defendant's educational level.

Entered this 12 day of July, 1989.

/s/ Walter C. Kurtz
WALTER C. KURTZ
JUDGE

APPROVED FOR ENTRY:
/s/ Floyd N. Price
Floyd N. Price
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Ordered that Court stand adjourned until morning at nine o'clock.

/s/ WALTER C. KURTZ, JUDGE

SUPPLEMENTAL APPENDIX D

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT NASHVILLE

SEPTEMBER SESSION, 1989

STATE OF TENNESSEE APPELLANT	NO. 89-194-III DAVIDSON COUNTY
V.	HON. WALTER C. KURTZ, JUDGE
MELVIN CRUMP APPELLEE	(Grant of Motion to Suppress) (Filed Apr. 25, 1990)

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REVERSED AND REMANDED
OPINION FILED: APR 25 1990
JERRY SCOTT, JUDGE

OPINION

This is an interlocutory appeal by the state pursuant to Rule 9, T.R.A.P., by which the state has appealed the order of the trial court suppressing the appellant's confession.

On September 27, 1988, the appellant was arrested for escape from the Tennessee State Penitentiary where he was serving time for murder. At the time of his arrest he was also a suspect in the murder and rape of an elderly woman. The arrest occurred between 10:00 A.M. and 1:00 P.M., at 1190 Eleventh Avenue South in Nashville, after the police received a tip as to where he was staying. After he was arrested he was placed in the front seat of a police car. Grady Elam, a detective with the Metropolitan Police Department, advised him of his rights. The appellant responded that he understood his rights and did not want an attorney. When asked whether he wanted to make a statement, the appellant said either "I don't have anything to say" or "I don't have anything to say right now." Mr. Elam asked the appellant no questions, but did tell him that they were investigating the murder and the appellant said, "I don't know anything about that."

The officers took the appellant to the police headquarters where Mr. Elam went inside to do the paperwork concerning the appellant's apprehension. Robert Moore of the Metropolitan Police Department had been present at the time of the appellant's apprehension. After

they arrived at headquarters, he decided to take the appellant back to the scene where he was apprehended, which was one to one and half blocks from the murder scene. The purpose of this trip was to try to get the appellant to give a statement regarding the murder. He asked the appellant if "he would ride the escape route with him," and the appellant agreed to do so. Two detectives and a Mr. Moran got in the car with the appellant and Mr. Moore and rode with them.[1] Mr. Moore heard Mr. Elam advise the appellant of his rights, but he did not know that the appellant had invoked his rights. No force or coercion was used against the appellant during the ride and the appellant even "nodded off" to sleep as they rode. According to Sergeant Moore, the appellant was not under the influence of drugs, but just appeared disinterested. The trip took approximately thirty minutes, and Mr. Smith asked most of the questions in the car.

They first drove to the day care center where the appellant had escaped from a painting detail. The appellant then retraced his escape route from the work detail. They stopped at the Maxwell House Hotel and he was asked if he had taken anything out of a car at the hotel. He admitted taking items from the car but said he had thrown them away. Mr. Moore told him that the items from the car were found in the murder victim's home, but the appellant made no response to that statement.

The appellant testified that during this riding around he was taken to a remote location where the police beat

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[1] While Mr. Moran testified, he was referred to throughout the record as "Officer Moran" and his given name does not appear.

him until he confessed. The trial judge found no validity to that claim and there were witnesses who saw him soon after his return to custody, who testified that, in spite of his statement that he'd been beaten, they found no evidence that his allegation was true.

At the conclusion of the riding around they returned to the police headquarters were the appellant was taken to an office for questioning. The questioning was tape recorded, beginning at 2:40 P.M. Mr. Smith gave the appellant his *Miranda* warnings. The appellant interrupted during the *Miranda* warning, but, according to Mr. Smith, the interruption had nothing to do with the warning. The interruption was not transcribed and Mr. Smith could not remember exactly what the appellant said. After being advised of his right to an attorney, the appellant interrupted and, according to Mr. Smith, said, "I don't want nairen." Mr. Smith testified that the word "nairen" is a southern slang term for "none." The appellant testified that what he said on the tape was, "I want one now." The judge found that it was impossible to discern from the garbled statement on the tape what was actually said, but he accredited Mr. Elam's statement that the appellant said he didn't want "nairen."[2]

---

[2] We have listened intently to the tape and we agree with the trial judge that it is difficult to hear exactly what the appellant said. From our examination, we believe Mr. Elam was correct when he testified the appellant said he didn't want "nairen." That term is defined as "never a one," Halliwell-Phillips, et al., *Dictionary of Archaic and Provincial Words*, (1847), or as "nothing," Wright, ed., *The English Dialect Dictionary* (1898).

The appellant testified that he had been arrested more than seven times since 1980, that his rights had been read to him on more than seven occasions, and that he knew his rights.

After the *Miranda* warnings, the appellant read and signed a waiver of his rights, then gave a full confession, which was tape recorded.[3]

The appellant moved that his confessions be suppressed, both his statements in the car and his tape recorded statement. The state conceded that it would not attempt to introduce the statements given in the car, but argued that the tape recorded statement should be admitted, since he was given fresh *Miranda* warnings. The trial court ordered that the taped statement also be suppressed. In so doing, the trial judge filed an excellent memorandum of law, setting forth his reasoning and the cases from the United States Supreme Court and other courts upon which he relied.

In determining whether the tape recorded confession was properly suppressed, we must engage in a two prong analysis. First, it must be determined whether the police "scrupulously honored" the appellant's invocation of his

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[3] The trial judge first found that when asked what level of education he had, the appellant replied "none." Actually, he replied "ninth," obviously referring to the ninth grade and the trial judge filed an order correcting that error. The trial judge found that the appellant is a person "of very limited education." We disagree. It is clear from the record, including the appellant's testimony at the hearing on the motion, that the appellant is very street-wise and understands the legal system quite well, including the *Miranda* warnings and their meaning.

right to remain silent. If a violation is found, the second prong of the analysis requires that we determine whether the violation was of constitutional dimension or merely a violation of the prophylactic rules set out in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). If the violation was merely one of a prophylactic rule, it was cured by the second *Miranda* warning and the issue must be whether the statement was voluntary. In *Oregon v. Elstad*, 470 U.S. 298, 309, 105 S.Ct. 1285, 1293, 84 L.Ed.2d 222 (1985), the Supreme Court noted that errors by law enforcement officers in administering the prophylactic *Miranda* procedures "should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself," and a simple failure to follow *Miranda*, "unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will" will not so taint the investigatory process that a subsequent voluntary and informed waiver will be ineffective for some indeterminate period. The admissibility of any subsequent statement should turn "solely on whether it is knowingly and voluntarily made." One court has noted that a second statement coming "on the heels of – if not in tandom with – the first, unconstitutionally obtained, compelled statement was unavoidably tainted" and "chameleon-like retains the coloration of the first as a matter of law." *State v. Hartley*, 103 N.J. 252, 511 A.2d 80, 97 (1986).[4]

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[4] This is the case upon which the trial court relied in excluding the taped confession. The holding was subsequently limited to its facts and deemed not applicable when the defendant reinitiates communication with the police. *State v. Fuller*, 231 N.J. Super 66, 554 A2d 1364, 1367 (1989).

The Fifth Amendment of the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." Through the Fourteenth Amendment this provision is applicable to the states. *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 1492, 12 L.Ed. 653 (1964).

In the famous case of *Miranda v. Arizona*, supra, the United States Supreme Court set forth the warnings that must be given before interrogation of one who is in custody. Once the warnings are given, an indication by the suspect that he wishes to remain silent stops the interrogation. Of course, the word "interrogation" refers not only to express questioning, but also to "any words or actions on the part of the police" that the officers should know are "reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689-1690, 64 L.Ed.2d 297 (1980).

Of course, it is clear from the facts of this case that Sergeant Moore anticipated that the riding around would elicit a confession. He candidly testified that was his purpose for the trip, and he obviously initiated it when he asked the appellant if he would accompany them.

In *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975), the Supreme Court set forth the test to determine whether statements taken after the invocation of the right to remain silent are admissible. Admissibility depends on whether the suspect's "right to cut off questioning" was "scrupulously honored." In *Mosley*, the defendant was advised of his rights and he invoked his right to remain silent. Two hours later, he was questioned by different officers at another location

about a different crime after again being fully advised of his *Miranda* rights. *Id.*, 96 S.Ct. at 327.

The Supreme Court found that his rights were scrupulously honored, noting that the officers immediately ceased the interrogation after the rights were invoked, questioning was resumed only after a significant amount of time had passed, Mr. Mosley was readvised of his *Miranda* rights and the second interrogation was restricted to a different crime. *Id.*, 96 S.Ct. at 327. Whether all of the factors cited by the Supreme Court in *Mosley* are required in every case has been an issue debated in the courts. *See*, e.g.: *State v. Hartley*, supra (minimum requirement is furnishing fresh *Miranda* warnings before resuming custodial interrogation); *United States v. Terry*, 702 F.2d 299, 317-318 (2d Cir. 1983) (forty minute recess, fresh *Miranda* warnings and a scrupulous respect for defendant's right made noncoerced statement admissible); and *United States v. Maddox*, 413 F.Supp. 60, 65-66 (W.D. Okla. 1976) (statement inadmissible where the police reinterrogated about the same offense).

It is clear that the police did not scrupulously honor the appellant's right to remain silent during the riding around interrogation. Sergeant Moore knew that the appellant had been advised of his rights, but did not attempt to learn whether he had invoked his rights. (He testified he heard Mr. Elam read the appellant his rights, but did not testify concerning whether he heard the appellant's response). The purpose of the trip was to get a confession and none of the safeguards set forth in *Mosley* were present.

It is clear that the statements made in the car were inadmissible and the state is not seeking their admission. However, the events in the car must be considered in determining the admissibility of the taped statement. It is worthy of note that the trial judge did not believe the defendant's statements that he was beaten, and there is no indication that there was any coercion either to get the appellant to ride with the officers or during the ride.

In *Michigan v. Tucker*, 417 U.S. 433, 434, 94 S.Ct. 2357, 2564, 41 L.Ed.2d 82 (1974), the Supreme Court found that the *Miranda* warnings are prophylactic rules not constitutional requirements.[5] In *Oregon v. Elstad*, 470 U.S. 290, 105 S.Ct. 1285, 1296, 84 L.Ed.2d 222 (1985), the Supreme Court held that "(a) subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement," since the fact finder may reasonably conclude that he made a "rational and intelligent choice whether to waive or invoke his rights." The United State Supreme Court has not dealt directly with the issue of whether the *Elstad* rule would apply to a situation where the defendant was previously warned, invoked his right to silence, but the officers ignored the invocation. In *Elstad*, the Supreme Court made it clear that *the* question in cases concerning admissibility where the Fifth Amendment

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[5] *Tucker* involved pre-*Miranda* questioning in which the officers failed to advise the defendant of his right to appointed counsel "free of charge" if he could not afford to retain counsel. (His trial occurred after *Miranda*.) 94 S.Ct. at 2360.

right to silence is involved is whether the confession is free and voluntary.

In *Elstad*, the defendant made incriminating statements at the scene of the arrest as a result of interrogation, but prior to any *Miranda* warnings being given. Subsequently, the defendant was given his warnings at police headquarters and then made a full confession. *Id.*, 105 S.Ct. at 1289-1290. In that case the court held that the proscription against compelled testimony is "fully satisfied" by barring the use of the unwarned statement. 105 S.Ct. at 1298. The court concluded that no further purpose is served by imputing "taint" to subsequent statements obtained pursuant to a voluntary and knowing waiver. The court noted that the fact that "a suspect chooses to speak after being informed of his rights is, of course, highly probative." *Id.*, 105 S.Ct. at 1298.

Thus, the question in this case is whether the tape recorded confession was voluntarily given or whether it was the product of coercion. Frankly, it doesn't even appear that the statement given in the car was the product of any coercion. That statement was, in our opinion, also voluntary, but was given after the appellant stated he invoked his right to remain silent.[6]

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[6] As Justice O'Connor observed in *Elstad*, "(w)hen neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder." 105 S.Ct. at 1295.

The trial court relied on *State v. Hartley,* supra, and *Christopher v. Florida,* 824 F.2d 836 841 (11th Cir. 1987).[7] Of course, those cases are persuasive authority only and are not binding on this Court.

In this case it is clear that the statements given at the tape recorded interview were entirely voluntary. The officers described the relatively comfortable setting in which the statement was given in an office at the police headquarters. The tape recording reveals the giving of the *Miranda* warnings, the appellant's response thereto and the extensive and detailed confession that he gave after being warned. While not a high school graduate, the defendant is anything but illiterate. He had a prior murder case in 1983 and testified that since 1980, when he became an adult, he has been arrested more than seven times and that on every occasion he has been read his rights. He testified emphatically that "he knows his rights." Thus, in a nutshell, it is clear that the appellant, fully cognizant of his right to speak or remain silent, chose, after the second *Miranda* warning, to give a detailed confession. To find this knowledgeable appellant's confession must be suppressed due to the failure of the officers to honor his prior decision to remain silent would effectively allow him to cleverly work the system to his advantage. As the Supreme Court noted long ago in a Sixth Amendment right to counsel case, the determination of whether there has been an intelligent waiver must

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[7] *Christopher* is distinguishable from this case in that it involved one extended period of questioning in which his unequivocal assertion of his right to remain silent was ignored. 824 F.2d 840.

depend upon the particular facts and circumstances surrounding that case, including the "background, experience, and conduct of the accused." *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 1023, 82 L.Ed. 146 (1938).

In *Oregon v. Elstad,* supra, 105 S.Ct. at 1298, the United States Supreme Court noted that "(a) handful of courts have, . . . applied our precedents relating to confessions obtained under coercive circumstances to situations involving wholly voluntary admissions, requiring a passage of time or break in events before a second, fully warned statement can be deemed voluntary. Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda* was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made." To make that determination, courts must look to "the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements."

From all of the circumstances, including the appellant's own testimony, it is clear that the second statement, given after proper *Miranda* warnings and a waiver of rights by the appellant, was entirely voluntary. The judgment suppressing the statement is reversed and this

cause is remanded to the trial court for further proceedings.

/s/ Jerry Scott
JERRY SCOTT JUDGE

CONCUR:

(Not participating)
MARTHA CRAIG DAUGHTREY, JUDGE

/s/ Adolpho A. Birch, Jr.
ADOLPHO A. BIRCH, JR., JUDGE